

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S LICENSE No. 48898  
Issued to: Louis E. LOUVIERE

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2386

Louis E. LOUVIERE

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 9 December 1983, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's license for one month upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator aboard the M/V EDGAR BROWN, JR. under the authority of the captioned license Appellant did, on or about 28 October 1983, negligently navigate said vessel at approximately mile 188 of the Gulf Intracoastal Waterway by failing to keep clear of a vessel he as overtaking thereby contributing to a collision between his tow and the tank barge AS 2008.

The hearing was held at Port Arthur, Texas, on 17 November 1983.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence five exhibits and the testimony of two witnesses.

In defense Appellant offered in evidence two exhibits and his own testimony.

After the hearing, the Administrative Law Judge rendered a written Decision and Order on 9 December 1983 in which he concluded that the charge and specification had been proved and suspended License No. 48898, issued to Appellant, for a period of one month.

The Decision and Order was served on 19 December 1983. Appeal was timely filed on 9 January 1984 and perfected on 15 October 1984.

FINDINGS OF FACT

At about 0400 on Friday 28 October 1983 Appellant was serving under authority of his license as Operator aboard the uninspected towing vessel M/V EDGAR BROWN, JR. The M/V EDGAR BROWN, JR. was pushing two barges ahead in tandem. It was underway in the Gulf Intracoastal Waterway enroute from Weeks Island, Louisiana, to Deer Park, Texas. There was fog in the area and visibility was poor.

Shortly before 0400, Appellant's vessel overtook the towing vessel M/V GEORGE F. SIMONS, also pushing two barges ahead in tandem. The M/V GEORGE F. SIMONS had pushed its barges up on the bank in order to wait for better visibility. Both vessels, with their tows, were headed in a westerly direction. As Appellant, with his flotilla, approached the M/V GEORGE F. SIMONS with its flotilla, he asked the Operator of the M/V GEORGE F. SIMONS to swing its stern to starboard closer to the bank to facilitate his passage. The Operator of the M/V GEORGE F. SIMONS complied. Appellant also asked the Operator of the M/V GEORGE F. SIMONS to push his lead barge closer to the north bank to provide more room. The Operator also agreed to this. The lead barge in the tow of the M/V GEORGE F. SIMONS was approximately 15 feet wider than the second barge and extended approximately 7-1/2 feet to either side of it. As Appellant overtook and passed the M/V GEORGE F. SIMONS, the bow of the lead barge of his tow collided with the aft port quarter of the lead barge in the tow of the M/V GEORGE F. SIMONS. The collision resulted in damage to both barges and an oil spill on the Gulf Intracoastal Waterway.

Each of the vessels and its respective tow had a maximum width of 50 feet. At mile 188, the point in question, the Gulf Intracoastal Waterway is approximately 200 feet wide.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by Administrative Law Judge. Appellant contends that the Administrative Law Judge erred in:

1. Failing to find that the tow of the M/V GEORGE F. SIMONS swung into the path of his vessel, thereby causing the collision.
2. Applying the Pennsylvania Rule to this case.

APPEARANCE: Louis H. Beard and Mark A. Freeman, of Wells, Peyton, Beard, Greenberg, Hunt, & Crawford, Beaumont, Texas.

#### OPINION

##### I

Appellant contends that the Administrative Law Judge

incorrectly applied Rule 13(a)(b) of the Inland Navigation Rules because the tow of the M/V GEORGE F. SIMONS swung out into the path of his flotilla as he was overtaking and passing it. I do not agree.

In his Decision and Order the Administrative Law Judge found that the M/V GEORGE F. SIMONS and its tow were stopped near the north bank in accordance with the testimony of the Operator of that vessel. Appellant bases his appeal on the facts as set forth in his own testimony which are contrary to the finding of the Administrative Law Judge.

It is the function of the Administrative Law Judge to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. Appeal Decision 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), and 2116 (BAGGETT). Since the Administrative Law Judge's finding is supported by the testimony of the Operator of the M/V GEORGE F. SIMONS, it will not be disturbed on appeal.

The Administrative Law Judge properly found that a vessel overtaking and passing another is obligated to keep out of the way of the overtaken vessel under Rule 13 of the Inland Navigational Rules, 33 U.S.C. 2013. Appellant having failed to do so, was properly found to have been negligent. The duty of the individual navigating the overtaking vessel, however, is not absolute. He is not held responsible when the overtaken vessel unexpectedly makes a maneuver which should not reasonably have been anticipated into the path of the overtaking vessel. Appeal Decision No. 2337 (NYBORG). Thus, had the Administrative Law Judge found that the tow of the M/V GEORGE F. SIMONS had in fact swung into the path of Appellant's flotilla, Appellant might not have been found negligent.

## II

Appellant asserts that the Pennsylvania Rule is no longer valid. I do not agree. However, I do not believe the rule applicable in this case.

Under the Pennsylvania Rule, if a vessel collides with another following a violation of the statutory navigation rules, the causal connection between the violation and the collision is presumed without further proof. The Pennsylvania, 83 U.S. 125 (1873); Appeal Decision 866 (MAPP) and 2358 (BUISSSET). However, in suspension and revocation proceedings, a violation of a navigation rule is, itself, negligence as well as misconduct. It is not necessary to show that the negligence actually caused the damage. See 46 CFR 5.05-20(a)(2). BUISSSET supra. Thus, application of the Pennsylvania Rule added nothing to this case.

### III

Although not specifically raised by Appellant one further matter is worthy of note.

The specification alleged only that Appellant was negligent because his barge collided with another barge. It did not allege that he failed to keep his vessel clear of a vessel which he was overtaking. As such, the specification is inadequate to "enable the person charge to identify the offense so that he will be in a position to prepare his defense," as required by 46 CFR 5.05-17(b). A negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts. BUISSET supra. See also Appeal Decision 2277 (BANASHAK) and 2174 (TINGLEY).

Nevertheless, Appellant raised no objection to the specification and all issues were fully litigated. It is clear from the record that Appellant and his counsel were aware of the nature of the Government's case and prepared to defend against it. Appellant does not now complain about the adequacy of the specification. "It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841 (D.C. Cir. 1950). See also Appeal Decisions 2166 (REGISTER) and 1792 (PHILLIPS).

Since there has been no prejudice to Appellant and he did not complain of the adequacy of the specification, if need not be set aside at this stage of the proceedings.

### CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

### ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 9 December 1983 is AFFIRMED.

B.L. STABILE

Vice Admiral U.S. Coast Guard  
VICE COMMANDANT

Signed at Washington, D.C. this 9th day of April, 1985.